

***United States Court of Appeals
for the Second Circuit***



APPENDIX

NO. 74-2234

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Appellant,

v.

FREDERICK COWAN & COMPANY, INC.,

Appellee.

On Appeal From An Order Of The United States
District Court For the Eastern District Of New York

APPENDIX

ELLIOTT MOORE,
Deputy Associate General Counsel,

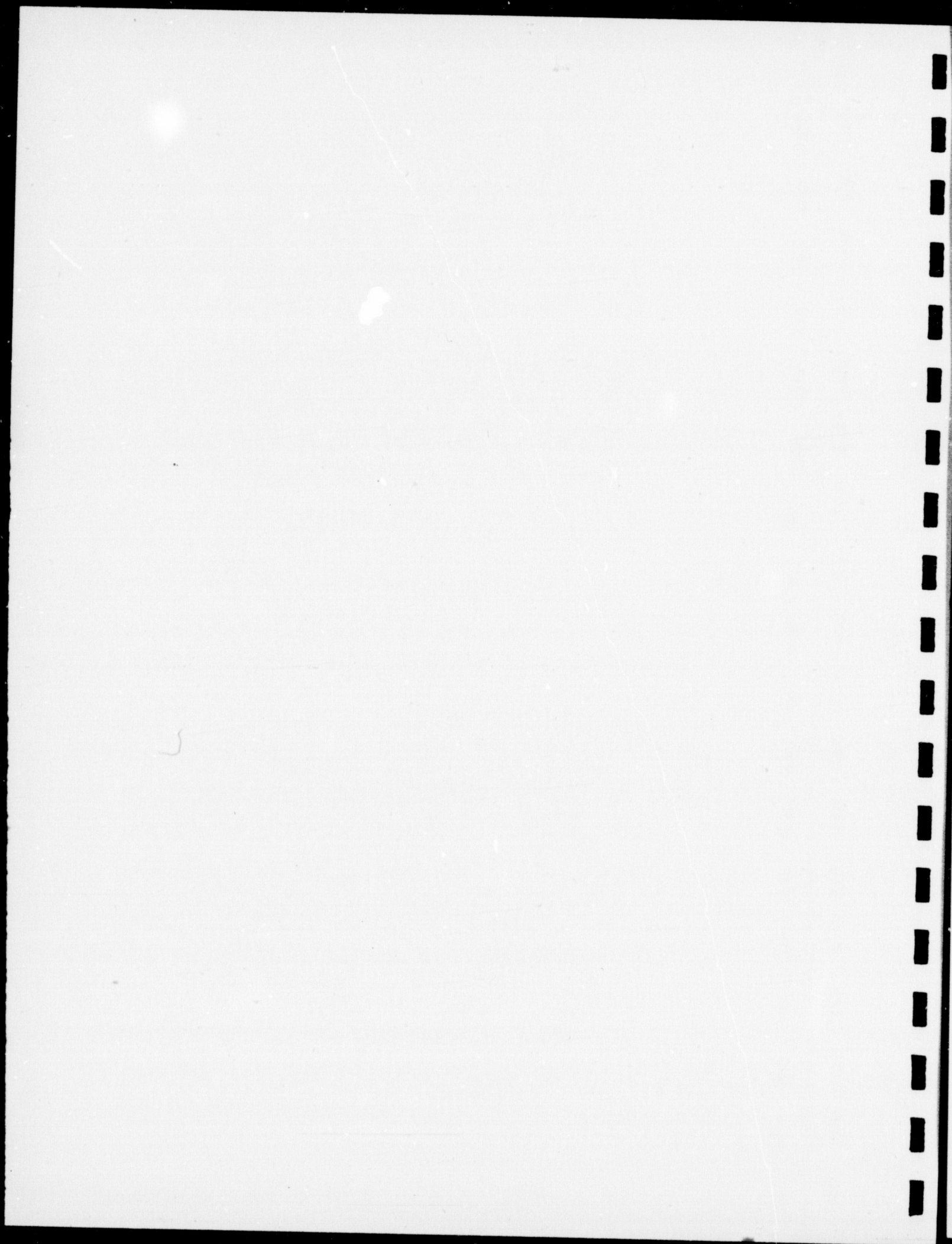
National Labor Relations Board.
Washington, D.C. 20570

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF NEW YORK

NATIONAL LABOR RELATIONS BOARD,
Appellant

v.

Docket 74C 791

FREDERICK COWAN & COMPANY, INC.,
Appellee

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

- 5-23-74 APPLICATION FILED for order requiring obedience to a subpoena Duces Tecum.
- 5-23-74 BY PLATT, J. ORDER TO SHOW CAUSE FILED why an order should not issue directing respondent to comply with the subpoena or to file with Samuel M. Kaynard, etc., an election eligibility list, etc. (returnable May 31, 1974 at 10:00 A.M.)
- 5-29-74 Certified copy of order to show cause filed with the U.S. Marshal's returns thereon; served upon Frederick Cowan & Co., Inc. on May 24, 1974; served upon Bruno Baratta, Esq., on May 24, 1974.
- 5-30-74 Affidavit of Frederick Cowan, President of Frederick Cowan & Company, Inc., in opposition, etc.
- 5-30-74 Memorandum filed in support of an application, etc.
- 5-31-74 Before PLATT, J. Case called. Motion requiring obedience to a subpoena, etc. MOTION ARGUED. Decision reserved. Submit papers.
- 7-17-74 BY PLATT, J. OPINION RENDERED AND FILED. The Board's motion is granted only to the extent that Respondent is directed to produce the names of all (and addresses of consenting) employees

eligible to vote in the new election directed by the Board but otherwise is denied in all respects. SO ORDERED. The Clerk of the Court is directed to mail copies of this opinion to counsel for the parties herein. (See Opinion)

- 7-19-74 BY PLATT, J. APPROVED JUDGMENT FILED. ORDERED and ADJUDGED that Applicant motion for an order requiring respondent to obey a subpoena duces tecum be granted to the extent that Respondent produce the names of all (and addresses of consenting) employees eligible to vote in the new election directed by the Board, BUT OTHERWISE is DENIED in all RESPECTS. (See Judgment)
- 7-22-74 Copy of letter of Clerk of Court filed dated July 22, 1974 re enclosure of a copy of memo., etc.
- 8-26-74 NOTICE OF APPEAL FILED. CERTIFICATE OF SERVICE FILED (attached)
- 8-26-74 Copy of Notice of Appeal was on this day mailed to Clerk, U.S. C.A.
- 8-26-74 Copies of Form C and D (Pre-Argument statement) mailed to ABIGAIL COOLEY, Assistant General Counsel for Special Litigation 1717 Pennsylvania Ave., N.W., Washington, D.C. 20570 - Copy of instructions re record on appeal also mailed on this day.
- 9-10-74 MEMORANDUM OF RESPONDENT FILED, etc.
- 9-16-74 All documents in this matter together with a certified copy of docket entries were on this day transmitted to Clerk, U.S.C.A.
- 9-25-74 Copy of Index filed with acknowledgment endorsed thereon by Clerk, U.S.C.A., re documents, etc.
-

[Dated May 21, 1974]

* * * * *

74-C-

APPLICATION FOR ORDER REQUIRING OBEDIENCE
TO A SUBPENA DUCES TECUM

The National Labor Relations Board, hereinafter referred to as the Board, by its General Counsel, and by Harold L. Richman, its Regional Attorney for Region 29, respectfully applies to this Honorable Court, pursuant to Section 11(2) of the National Labor Relations Act, for an order requiring Frederick Cowan & Company, Inc., hereinafter referred to as Respondent, to obey a certain subpoena *duces tecum*, issued by the Board and duly served upon it in the manner provided by law. In support of said application, upon information and belief, the Board respectfully shows as follows:

1. Applicant is an administrative agency created by the National Labor Relations Act, referred to hereinafter as "the Act" (29 U.S.C., Sec. 151, *et seq.*), and is empowered and directed to administer the provisions of the Act, including the investigation of questions of employee representation under Section 9 (29 U.S.C., Sec. 159).
2. Respondent is an employer engaged in the manufacture of goods for interstate commerce within the meaning of Section 2(6) and (7) of the Act (29 U.S.C., Sec. 152(6) and (7)).
3. Jurisdiction is conferred on this Court by Section 11(2) of the Act (29 U.S.C. Sec. 161(2)), giving the District Courts jurisdiction to issue orders, upon application of the Board, to enforce subpoenas issued by the Board.
4. Jurisdiction is also conferred on this Court by 28 U.S.C., Sec. 1337 giving the District Courts original jurisdiction "of all suits and proceedings under any law regulating commerce," without regard to citizenship of the parties or the sum or value in controversy, and by Section 9(c) of the Act (29 U.S.C., Sec. 159(c)).

5. Section 9(c) of the Act authorizes the Board, in the furtherance of the broad Congressional purpose of promoting the free flow of commerce, to conduct an investigation upon the filing of a valid representation petition and, if the Board finds that a question of representation exists, to direct an election by secret ballot and certify the results.

6. Respondent's two plants involved in this proceeding are located in Nassau County, New York, within this judicial district; one plant is located at 120 Terminal Drive, Plainview, New York; the other plant is located at 101 Commercial Street, Plainview, New York.

7. On February 6, 1973, a labor organization, Local Lodge No. 5, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, herein called the Union, filed a petition with the Board's Region 29 at Brooklyn, New York, asserting its claim to represent Respondent's production and maintenance, shipping and receiving employees and drivers employed at Respondent's plant at 120 Terminal Drive, Plainview, New York, and seeking a representation election to establish its majority support among these employees. A copy of the petition is attached hereto as Exhibit A.

8. The proceeding instituted by the petition is known on the records of the Board as Case No. 29-RC-2175.

9. Earlier actions taken in the proceeding instituted by the petition, which are detailed in the Decision of the Honorable James M. Fitzpatrick, an Administrative Law Judge of the Board, issued on October 31, 1973, were set aside by the said Administrative Law Judge for the reasons set forth in the aforesaid Decision and by Order of the Board, dated January 18, 1974, and the proceeding was remanded by the Board to the Board's Regional Director for Region 29. Copies of the Decision of the Administrative Law Judge and of the Order of the Board are attached hereto as Exhibit B and C, respectively.

10. On April 10, 1974, the Board's Regional Director for Region 29 issued a Decision and Direction of Election in the proceeding, pursuant to Section

9(c)(1) of the Act (29 U.S.C., Sec. 159(c)(1)). A copy of the Decision and Direction of Election is attached hereto as Exhibit D.

11. In his Decision and Direction of Election, the Regional Director directed that an election be held in a unit of approximately 25 production and maintenance, shipping and receiving employees and drivers at Respondent's two plants in Plainview, New York (Exhibit D).

12. The Regional Director further directed Respondent (Exhibit D, n. 3) to furnish an election eligibility list containing the names and addresses of all the employees eligible to vote, to the Regional Director on or before April 17, 1974 in accordance with the election rule announced by the Board in its decision in *Excelsior Underwear, Inc.*, 156 NLRB 1236, and approved by the Supreme Court in *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759.

13. Under the Board's *Excelsior* rule, an employer is required to file with the Board's Regional Director, in the region where the representation proceeding is pending, a list of the names and addresses of all employees eligible to vote in the representation election within 7 days after the issuance of a Decision and Direction of Election or after the close of the determinative payroll period for eligibility purposes, whichever is later.

14. The *Excelsior* rule further provides that the Regional Director is then to make the list of employee names and addresses available to all parties to the representation proceeding in order to promote the communication of election issues to the employees and to aid in challenging the ballots of employees believed to be ineligible to vote.

15. The Board was acting within its statutory authority in establishing the election rule announced in its *Excelsior* decision.

16. On April 18, 1974, Respondent requested of the Regional Director, by telegram, that it be granted an extension of time regarding the "*Excelsior* requirement." A copy of Respondent's telegram is attached hereto as Exhibit E.

17. By letter of May 3, 1974, the Regional Director denied Respondent's request for an extension of time to file the list of names and addresses of eligible voters in the proceeding. A copy of the Regional Director's letter is attached hereto as EXHIBIT F.

18. At all times material the Union has requested that no election be held in the proceeding until Respondent complies with the Board's *Excelsior* rule and has requested that the Board take all necessary steps to compel respondent to comply with the Board's *Excelsior* rule.

19. The Regional Director caused a subpoena *duces tecum* to be issued on May 6, 1974, pursuant to Section 11(1) of the Act (29 U.S.C., Sec. 161(1)), directing Respondent to produce and make available to the Board's Regional Office Respondent's books and records, or an eligibility list in lieu thereof, setting forth the names and addresses of all employees eligible to vote in the election. A copy of the subpoena is attached hereto as Exhibit G.

20. By the terms of the subpoena, Respondent was given the option of producing the specified records at the Board's Regional Office, for inspection and copying of the relevant data by Board agents on May 15, 1974 at 11:00 A.M., or of filing an election eligibility list containing the relevant data with the Board's Regional Director on or before the return date of the subpoena, provided that, upon request, designated Board agents be permitted to verify the list by examination of the subpoenaed books and records at a time and place convenient to respondent but not later than the return date of the subpoena, or some later date specified by the Regional Director or his designated representative.

21. The subpoena was served upon Respondent by registered mail addressed to Respondent at 120 Terminal Drive, Plainview, New York, on or about May 6, 1974. A copy of the registered mail return receipt, signed by a representative of Respondent, is attached hereto as Exhibit H.

22. On May 15, 1974 at 11:00 a.m. a hearing was conducted at the Board's Regional Office before Arthur Goldberg, a duly designated Hearing Officer of the Board, for the purpose of receiving the materials called for by the subpoena. Respondent failed to appear on said date, at said time and place, and failed to produce, and continues to fail and refuse to produce, any of the material called for by the subpoena. A copy of the official transcript of the hearing before the Board's Hearing Officer is attached hereto as Exhibit I.

23. Respondent's refusal to comply with the subpoena constitutes contumacious conduct within the meaning of Section 11(2) of the Act (29 U.S.C., Sec. 161(2)).

24. Respondent's refusal to comply with the Board's election rule has impeded, and continues to impede, the Board in resolving the question of representation before it in this case, and has prevented, and continues to prevent, the Board from conducting a fair and free election in accordance with the policy of the Act set forth in Section 1 and the Board's functions and duties specified in Section 9(c) (29 U.S.C., Secs. 151 and 159(c)).

WHEREFORE, the applicant, National Labor Relations Board, respectfully prays:

(a) That an Order To Show Cause issue forthwith directing the Respondent, Frederick Cowan & Company, Inc. to appear before this Court on a day certain to be fixed in said order, and that it show cause, if any there be, why an order should not issue directing it to produce and make available to the Board's Regional Office, Respondent's books and records, or an election eligibility list in lieu thereof, showing the names and addresses of all employees eligible to vote in the election directed by the Board in Case No. 29-RC-2175.

(b) That upon the return of said Order To Show Cause, an order issue directing respondent to produce and make said records available to authorized Board agents at the Board's Regional Office, for inspection and copying of the relevant data, or, in lieu thereof, to file said eligibility list with the Regional

Director; and

(c) That the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

No previous application has been made for the relief sought herein.

Dated at Brooklyn, New York, this 21st day of May, 1974.

NATIONAL LABOR RELATIONS BOARD
PETER G. NASH, GENERAL COUNSEL

/s/ Harold L. Richman
Harold L. Richman
Regional Attorney
National Labor Relations Board, Region 29
16 Court Street
Brooklyn, New York

[VERIFICATION, dated May 21, 1974]

[Dated May 23, 1974]

* * * * *

ORDER TO SHOW CAUSE

The National Labor Relations Board, hereinafter referred to as the Board, by its General Counsel, and by Harold L. Richman, its Regional Attorney for Region 29, having filed its Application for an Order requiring Respondent Frederick Cowan & Company, Inc., to obey and comply with a subpoena *duces tecum*, duly served upon said Respondent as set forth in said Application and good cause appearing therefor, it is hereby

ORDERED that Respondent Frederick Cowan & Company, Inc. appear and show cause, if any there be, at Room of the United States Courthouse, 225 Cadman Plaza East, Brooklyn, City and State of New York, on the day of at a.m., or as soon thereafter as counsel can be heard, why an order

of this Court should not issue directing Respondent Frederick Cowan & Company, Inc. to comply with the subpoena or to file with Samuel M. Kaynard, Regional Director for Region 29 of the Board, in compliance with the Board's election rules, an election eligibility list containing the names and addresses of all the eligible voters in an election directed by the said Regional Director, on behalf of the Board, in Case No. 29-RC-2175, pursuant to Section 9 of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, and

FURTHER ORDERED that service on the Respondent of this Order To Show Cause, and the Application on which it is issued, be made on or before _____ and that said Respondent shall file and serve its Answer to the Application not later than _____, Service of a copy of this Order, of the Application, and of Respondent's Answer, in any manner provided for by the Rules of Civil Procedure for the District Courts of the United States shall be deemed good and sufficient service.

Dated at Brooklyn, New York, this 23rd day of May, 1974.

United States District Judge

EXHIBIT A

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PETITION

Form Approved
NLRB Form No. 54 (Rev. 1-14)

INSTRUCTIONS - Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.
If more space is required for any one item, attach additional sheets, numbering them accordingly.

DO NOT WRITE IN THIS SPACE	
CASE NO.	25-AC-2175
DATE FILED	2-6-73

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its power pursuant to Section 9 of the National Labor Relations Act.

1. Purpose of this Petition (If box RC, RN, or RU is checked and a charge under Section 8(a)(1) of the Act has been filed regarding the Employer named herein, the statement following the description of the type of petition shall not be deemed made.)

(Check one)

- ☐ RC-CERTIFICATION OF REPRESENTATIVE - A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner and Petitioner desires to be certified as representative of the employees.
- ☐ RN-REPRESENTATION (EMPLOYER PETITION) - One or more individuals or labor organizations have presented a claim to Petitioner to be recognized as the representative of employees of Petitioner.
- ☐ RD-DECERTIFICATION - A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative.
- ☐ LD-WITHDRAWAL OF UNION SHOP AUTHORITY - Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.
- ☐ UC-UNIT CLARIFICATION - A labor organization is currently recognized by employer, but petitioner seeks clarification of placement of certain employees. (Check one)
☐ In unit not previously certified
☐ In unit previously certified in Case No. _____
- ☐ AC-AMENDMENT OF CERTIFICATION - Petitioner seeks amendment of certification issued in Case No. _____.

Attach statement describing the specific amendment sought.

2. NAME OF EMPLOYER
Frederick Cohen and Company EMPLOYER REPRESENTATIVE TO CONTACT
Frederick Cohen PHONE NO.
(316) 935-6161

3. ADDRESSES OF ESTABLISHMENTS INVOLVED (Street and number, city, State, and ZIP Code)
100 Terminal Drive, Plainville, New York

4a. TYPE OF ESTABLISHMENT (Factory, store, warehouse, etc.)
FACTORY 4b. IDENTIFY PRINCIPAL PRODUCT OR SERVICE
Surfact Systems

5. Unit Involved (The EC petition, describe PRESENT bargaining unit and attach description of proposed classification.)

Included: **Production and Maintenance, employees, shipping, and receiving, employees, and drivers at the employers plant located at 100 Terminal Drive, Plainville, New York.**

Excluded: **office clericals, draftsmen, engineers, supervisors and guards as defined in the Act.**

6a. NUMBER OF EMPLOYEES IN UNIT
PRESENT **15**
PROPOSED (BY UC/AC)

6b. IS THIS PETITION SUPPORTED BY 30% OR MORE OF THE EMPLOYEES IN THE UNIT?
☐ YES ☐ NO
 *Not Applicable in RN, EC, and AC

(If you have checked box RC in 1 above, check and complete EITHER item "a" or "b" whichever is applicable)

7a. ☐ Request for recognition as Bargaining Representative was made on _____ (Month, day, year) and Employer declined recognition on or about _____ (Month, day, year) (If no reply received, so state)

7b. ☐ Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agents (If there is none, so state)

NAME **NONE** AFFILIATION

ADDRESS DATE OF RECOGNITION OR CERTIFICATION

9. DATE OF EXPIRATION OF CURRENT CONTRACT, IF ANY (Show month, day, and year) **1-1-74** 10. IF YOU HAVE CHECKED BOX 10 IN 1 ABOVE, SHOW HERE THE DATE OF EXECUTION OF AGREEMENT GRANTING UNION SHOP (Month, day, and year)

11a. IS THERE NOW A STRIKE OR PICKETING AT THE EMPLOYER'S ESTABLISHMENT(S) INVOLVED? YES ☐ NO ☐ 11b. IF SO, APPROXIMATELY HOW MANY EMPLOYEES ARE PARTICIPATING?

11c. THE EMPLOYER HAS BEEN PICKETED BY OR ON BEHALF OF **NONE** (Insert names) A LABOR ORGANIZATION OF _____ SINCE _____ (Insert address) (Month, day, year)

12. ORGANIZATIONS OR INDIVIDUALS OTHER THAN PETITIONER AND OTHER THAN THOSE NAMED IN ITEMS 8 AND 11c, WHICH HAVE CLAIMED RECOGNITION AS REPRESENTATIVES AND OTHER ORGANIZATIONS AND INDIVIDUALS KNOWN TO HAVE A REPRESENTATIVE INTEREST IN ANY EMPLOYEES IN THE UNIT DESCRIBED IN ITEMS 5 ABOVE (If none, so state)

NAME	AFFILIATION	ADDRESS	DATE OF CLAIM (Required only if Petition is filed by Employer)

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

International Brotherhood of Teamsters, Iron Ship Builders, Blacksmiths, and Helpers AFL-CIO (Petitioner and affiliation, if any)

Signature of representative or person filing petition _____ (Title, if any)

Address _____ (Street, city, State, and ZIP Code) Telephone number _____

EXB A

EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

FREDERICK COWAN & COMPANY, INC.,
and Employer

Case No. 29-RC-2175

LOCAL LODGE NO. 5, INTERNATIONAL
BROTHERHOOD OF BOILERMAKERS, IRON
SHIP BUILDERS, BLACKSMITHS, FORGERS
AND HELPERS, AFL-CIO,
Petitioner

FREDERICK COWAN & COMPANY, INC.,
and Respondent

Case No. 29-CA-3340-2

STEPHEN EGGLINER, An Individual
and

Case No. 29-CA-3340-3

JUSTO ALVAREZ, An Individual

Howard Edelman, Esq., Brooklyn, N.Y.
for the General Counsel
Bruno Baratta, Esq., (Baratta & Solleder),
Mineola, N.Y., for the Respondent-
Employer.

[Filed October 31, 1973]

DECISION

Statement of the Case

JAMES M. FITZPATRICK, Administrative Law Judge: These are unfair labor practice proceedings under the National Labor Relations Act, as amended, (The Act) consolidated with proceedings on objections to conduct affecting the results of a Board election under the same Act.

The litigation arises in the following manner. On February 6, 1973¹ Local Lodge No. 5, International Brotherhood of Boilermakers, Iron Ship Builders,

¹ All dates herein are in 1973 unless otherwise indicated.

Blacksmiths, Forgers and Helpers, AFL-CIO (herein called Petitioner or the Union) filed a petition with the Board (Case No. 29-RC-2175) requesting an election among employees of Frederick Cowan & Company, Inc. (herein called Employer or Respondent). On February 21, the Union and Respondent executed in that Case a Stipulation for Certification Upon Consent Election which was approved February 23 by the Regional Director for the Board's Region 29. As a result, a Board election was conducted on March 14 among Respondent's production and maintenance employees, including shipping and receiving employees and drivers, employed at both of Respondent's business locations. The tally of ballots from that election indicates that out of approximately 28 eligible voters, 25 ballots were cast, of which 11 were for the Union, 12 against, and 2 were challenged.

On March 20, the Union filed timely objections to conduct affecting the results of the election which it later supplemented by a letter on March 28.

Thereafter unfair labor charges that Respondent had violated Section 8(a)(1) of the Act were filed by Stephen Egglinger (Case No. 29-CA-3340-2) on April 10, and by Justo Alvarez (Case No. 29-CA-3340-3) on April 17. Based on these charges the Regional Director for Region 29 issued a consolidated complaint on June 29 alleging that Respondent had committed various violations of Section 8(a)(1) of the Act, including interrogating employees about union activities, instigating the formation of an employee committee to negotiate with Respondent, bargaining directly with employees, offering employees benefits if they did not support the Union in the election, and polling employees for permission to reveal their addresses to the Union prior to the election.

In the meantime the Regional Director investigated the challenged ballots and the objections filed by the Union, as well as the other conduct which resulted in the issuance of the consolidated complaint. On July 25, he issued a

Report on Objections and Challenged Ballots, Order Consolidating Cases and Notice of Hearing. In his Report he recommended to the Board that the challenges to the two ballots be sustained and that one of the Union objections be overruled. He ordered a hearing on the issues raised by the other objection, which was based on the polling of the employees, as well as certain other conduct revealed in his investigation. He ordered consolidation of the unfair labor practice cases with the representation proceedings for hearing ruling and decision by an Administrative Law Judge.

On August 14, the Board adopted the Regional Director's recommendations, in accordance therewith ordered the challenges to the two ballots sustained, and overruled one objection. The Board further ordered that the issues raised with respect to the remaining objection be processed in accordance with the Regional Director's order consolidating cases.²

Pursuant to these orders the present matters came on for hearing at Plainview, New York on August 29, 30, and 31. At the hearing the General Counsel amended the complaint to alleged additional violations by Respondent of Section 8(a)(1) in the form of threats. Also at the hearing Respondent filed an answer to the complaint denying all alleged unfair labor practices, thus putting those allegations in issue. Respondent's answer also denied the alleged supervisory status of one Henry Carney and the alleged agency of one Louis Minafra, thus raising issues of Respondent's responsibility for alleged acts of those persons. Respondent's motion to dismiss made at the end of the hearing is

² I take official notice of the Board's order of August 14 in Case 29-RC-2175 which, apparently through inadvertence, was omitted from the formal exhibits introduced during the hearing herein. After the close of the hearing the General Counsel offered the omitted document, a procedure to which Respondent's counsel was unwilling to consent. In view of the official nature of the document and the absence of affirmative objection from Respondent, there appears to be no reason for excluding it. For purposes of convenience I have marked it ALJ Exhibit 1 and the General Counsel's covering letter ALJ Exhibit 2, and placed both among the exhibits in this case.

disposed of in accordance with the findings hereinafter made. It is denied except as to paragraphs 9(b) and 10 of the complaint in which regard it is granted.

Upon the entire record and my observations of the witnesses I make the following:

Findings of Fact

I. The Business of the Employer

Respondent is a New York corporation engaged at Plainview, New York in the design, manufacture, sale and distribution of burner management systems used in boilers in industrial and other large facilities. It has two locations in Plainview, the main plant and a second location nearby to which it has expanded.

In the year preceding the issuance of the complaint Respondent manufactured, sold and distributed at its plants products valued in excess of \$50,000 which were shipped directly in interstate commerce to points outside New York State. It is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

The Union, Local Lodge No. 5, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

Union activity at Respondent's plants commenced in early February when union business representative William Koenig placed on employee automobiles in the parking lot cards suggesting that they contact him if they were interested in the Union. This stimulated sufficient discussion among the employees to cause six of them (Justo Alvarez, Steve Gonda, Steve Egglinger, George Logue, Dave Tucciarone and Steve Bacus) to set up a dinner meeting on February 5 with Koenig during which he explained the advantages of union representation. All of these employees then signed union authorization cards. The next day,

February 6, Koenig filed the representation petition with the Board seeking an election in Case No. 29-RC-2175.

III. The Alleged Threats, Coercion and Restraint

A. Alleged Interrogation

The complaint alleges that on February 6 and various other dates in February and March Respondent, through Henry Carney, its agent and supervisor, and other agents and supervisors, interrogated employees about their union activities. Respondent denies the interrogation occurred or that at the times in question Carney was a supervisor or an agent.

1. The supervisory status of Henry Carney.

According to the General Counsel the crucial period was the latter part of 1972 and the first three months of 1973. Respondent admits that at the present time Carney is a supervisor. It contends, however, that at an earlier point he had been a rank and file employee and that during the crucial first three months of 1973, although he was under consideration for future elevation to the job of foreman, he had not yet achieved supervisory status. Accordingly, Respondent contends that even if he interrogated employees, it is not responsible for such conduct. I find that a preponderance of the evidence supports the contention that Carney was a supervisor.

The two principal officers of Respondent are Frederick Cowan, president, and Mildred Cowan, his wife, secretary-treasurer. Frederick Cowan devotes most of his time to general supervision of production and engineering. Mildred Cowan is in charge of the office, personnel matters and financial books and records. Until June 1972 all production work at both locations was under the immediate supervision of one shop foreman (not Carney).

Carney was hired three or four years ago as a rank and file wirer in the electrical shop. He was not a supervisor. In June 1972 when the then shop foreman was removed from that job, the shop was divided into two parts; a

shop for mechanical production work under the supervision of George Beckman, and an electrical shop under the supervision of Carney. Collectively, Beckman and Carney replaced the previous shop foreman. Frederick Cowan testified that he did not then give Carney the title of foreman. But he considered him to be a supervisor. And he did direct Carney to supervise the other men (about 16) in the electrical shop. Although he partially replaced the former foreman who was salaried, Carney continued to receive an hourly wage until June 1973, when he first was paid a salary and officially called foreman. However, long before that the employees whom he supervised considered him to be their foreman. And there was no supervision over Carney except Mr. and Mrs. Cowan. Although he had no authority on his own to hire or fire, he could effectively recommend in that regard. He was responsible for assigning work in the electrical shop, using his own judgment in that regard; responsible for the proper performance of that work; corrected electricians who performed poor quality work; selected the employees who were to work overtime; and received some employee requests for time off which he cleared through Mrs. Cowan. During the months of January thru March 1973, according to his own testimony he was in charge of the electrical shop, as well as the stock and shipping rooms.

2. Interrogation by Carney

On February 6, the day the election petition was filed and the day after the Union organizational dinner at which six employees had signed authorization cards, Carney asked a couple of employees including Nicholas Raptou if they had attended the dinner. According to Raptou he also asked him if he had signed a blue card (an authorization card). Carney denied that he had asked about the authorization cards on the ground that he did not know they existed at that time. However, his testimony about the interrogations was more general and less precise than that of Raptou. Accordingly, I credit the version of Raptou.

On these facts it is clear that Carney, who was a supervisor at the time, unlawfully interrogated employees about their union activities thereby committing an unfair labor practice proscribed by Section 8(a)(1) of the Act for which Respondent is responsible.

B. Alleged Threats

The complaint as amended at the hearing also alleges that Respondent violated Section 8(a)(1) when Carney and Frederick Cowan six or seven days after the Union dinner meeting on February 5 threatened employees with discharge for engaging in union activity.

At the Union organizing dinner on February 5 some of the employees, present, in addition to signing authorization cards for themselves, took a supply for distribution among other employees at the plant. George Logue, an engraver in the electrical department, was one of those who took a supply of blank cards for later distribution.

Logue testified that he solicited employee signatures on union authorization cards both in and out of the plant. The thrust of his initial testimony was to the effect that he did so during nonworking time. I find that he did distribute during nonworking time. On cross-examination he implicitly admitted that until he was cautioned by Mr. Cowan he also distributed them on Company time.

According to Logue, three to four days after the union organizing dinner on February 5, Carney, his supervisor, told him that discussion of union business during working hours could subject him to dismissal. About three days later Carney sent him to the office to see Mr. Cowan who told him that he understood Carney had warned him three times about talking union, about leaving his job and walking around the shop, and that if it happened again Logue could be in trouble.

Carney admitted that he told Logue not to discuss Union business on Company time and that Mr. Cowan had instructed him to do so after Carney

reported that the employees were not working. He testified further that as late as March when he observed Logue away from his work station and overheard him discussing union matters, he told him, "Mr. Cowan doesn't want you talking union business on Company time" and he further told him to get back to work.

On this evidence I find that Carney and Cowan reprimanded Logue and others for discussing the Union on Company time; that Carney indicated that he could be dismissed for doing so; and that Cowan told him that if it happened again he could be in trouble. The weight of the evidence indicates, however, that these reprimands were occasioned by Logue leaving his work station and moving about the plant and by Carney's general observation that employees were not working. The reprimands appear to have been an effort by management to keep the employees working rather than an effort to stifle unionism.

Logue also testified that he overheard Carney reprimand other employees including Alvarez, Raptou and Egglinger, for talking about the Union during working hours. Although all three of these employees testified, none indicated that he was threatened. In the circumstances I find that there is insufficient evidence upon which to base a finding that Carney or Cowan unlawfully threatened employees in violation of Section 8(a)(1) of the Act.

C. Instigation of Employee Committee for Bargaining

The complaint alleges, and the answer denies, that Respondent on February 12 in the person of Carney suggested to the employees that they form a committee to discuss grievances and negotiate terms and conditions of employment directly with Respondent. I find that the evidence establishes that such a suggestion was made, not by Carney, but by an engineering employee named Louis Minafra.

At the beginning of the workday on February 12 Carney with the approval of Frederick Cowan called a meeting of all employees in the Company

lunchroom. Two other supervisors in addition to Carney attended. The meeting lasted about 2 hours. Carney opened the meeting by saying he felt there was something going on in the Company and it would be a good idea to get it out in the open and have an open discussion regarding it. No one present rose to the bait, so Carney, according to the testimony of George Logue, said words to the effect, "Well, come on now, we're all one family, let's find out what's going on." I find that these opening remarks of Carney were an unlawful interrogation of employees respecting their union activities and constituted a violation by Respondent of Section 8(a)(1) of the Act.

Shortly after the meeting began, engineering employee Louis Minafra happened along on his way to his office and joined the meeting. Sensing that the employees were troubled and that their interest in the Union was somehow involved, he asked what was bothering them and expressed his views in opposition to a union in such a small company. In speaking against the Union he stated that once a union got in the employees would be stuck with it and that they should first give Frederick Cowan a chance. Other employees including Justo Alvarez spoke up for the Union and there was an opened exchange of ideas. Except for Carney's calling of the meeting and his opening remarks, the supervisors present did not actively participate in the discussion, although they may have indicated approval on some points and they raised no objection to any part of the proceeding.

Minafra became the central figure and carried the ball. He suggested to the group that they formulate their ideas in some manner that could be presented to Frederick Cowan. At that point Logue pulled from his pocket a list of topics which he had prepared at home and was intended for presentation to the Union as a rough draft of demands to be made upon the Company. There were 34 items on the list, all of them typical of provisions to be found in collective-bargaining agreements. For example, item 1 read "overtime after 8 hours," item 11 read "dental plan," item 24 "3 year contract."

According to Logue he had been shop steward for another union on a prior job. His list of demands reflects his familiarity with collective-bargaining agreements.

Logue's list, however, never reached the Union. The assembled employees, with Minafra in the lead, used it as a basis for their continued discussion, Minafra indicating he thought some items on list had merit. He suggested that the employees attempt to get Company agreement on improvements and working conditions using Logue's list as a guideline. The group decided to have copies made of the list for distribution among themselves and to meet again for further discussions. Minafra arranged for the list to be duplicated on the Company copying machine.

Later that same day or the following day the employees reconvened for the purpose of continuing their discussions. Minafra distributed the duplicated copies of Logue's list and each employee present indicated on his copy those items which he considered should be pushed.

Finally Minafra suggested that an employee committee be formed to present the group's proposals to management. The group then discussed whether they should have a committee represent them. They resolved the matter by selecting a committee made up of representatives from each department. It is not clear from the record how many were on the committee. The evidence does indicate that at least two members, Logue and Dave Tucciarone, were also among the original six employees who started the union organizing. Employee Russell Steele and a machinist whose name does not appear in the record were also named to the committee.

On these facts I find that the Respondent in the person of Carney did not suggest the formation of an employee committee to bargain directly with the employer. The evidence shows instead that Minafra made the suggestion. It is not alleged that he was a supervisor. It is alleged that he was an agent of the Company. But a preponderance of the evidence establishes, and I find,

that he was a volunteer in participating in the employee meetings and suggesting the formation of the committee. The evidence indicates that he was not instructed by management to do what he did. The fact that management went along with what he did, in my view, does not without more make Respondent responsible for his conduct. On this record, I find there is insufficient evidence to establish that Respondent instigated formation of the employee committee.

D. Bargaining directly with Employees

The complaint also alleges, and the answer denies, that Respondent bargained directly with its employees thereby violating Section 8(a)(1) of the Act. I find it did so bargain. The complaint also alleges, and the answer denies, that Respondent unlawfully offered and promised employees benefits and improvements in terms and conditions of employment for the purpose of inducing them not to support the Union and to vote against it in the upcoming election. I find that in the direct bargaining with employees Respondent made such offers and promises and that in the circumstances its purpose was to undercut the Union.

The evidence establishes that on or about February 14 or 15, shortly after the employees selected the committee to represent them, the committee met with management to discuss the items on Logue's list which the employees had indicated they were most concerned about. In addition to the committee those present included Mr. and Mrs. Cowan, Carney and Minafra. The evidence indicates that the discussions were between the Cowans on the one side and the committee on the other. The record does not reveal what part Carney and Minafra played in the discussions or to which side, if any, of the bargaining table they were oriented.

According to Logue, whom I credit, the discussions covered various terms and conditions of employment. It turned out that some of the improvements which the committee was seeking were benefits the employees already enjoyed

but the committee was unaware of. Among other things they discussed overtime after 8 hours work. They also discussed whether double time should be paid under certain conditions. That matter was not resolved but was held for further discussion. They discussed weight limitation on trucks and reached agreement on this. They also discussed and reached agreement on allowing employees time for supper when they worked overtime and they discussed and reached agreement on improvements in safety equipment.

From the above it is clear that whether or not Respondent was responsible for instigating the formation of the employee committee, it nevertheless acceded to the existence and functioning of that committee and in the person of its two principal officers, Mr. and Mrs. Cowan, proceeded to bargain collectively with it. This occurred in the context, set by Minafra, that the employees before resorting to the Union should approach the Cowans directly through a committee of their own members and see what they could work out. This circumventing of the Union necessarily undercut its appeal in the upcoming election. By recognizing, bargaining with, and promising improvements to, the committee while an election petition was pending and a question concerning representation existed, the Respondent joined in undercutting the Union and thereby committed an unfair labor practice within the meaning of Section 8(a)(1) of the Act. *Family Bargain Centers, Inc.*, 160 NLRB 816; *N.L.R.B. v. Exchange Parts Co.*, 375 U.S. 405.

E. Polling the Employees

The complaint also alleges, and the answer denies, that Respondent violated Section 8(a)(1) by polling the employees as to whether they desired their addresses given to the Board and the Union.

1. Stipulation for Election

As a result of the Union's representation petition in Case No. 29-RC-2175 filed on February 6 requesting a Board election in a unit consisting of produc-

tion and maintenance employees of Respondent, including shipping and receiving employees and drivers, Respondent, the Union and a Board agent met on February 21 for the purpose of negotiating a stipulation for certification upon consent election. Those present for the Respondent included Mr. and Mrs. Cowan and their attorney, Bruno Baratta. The Union was represented by William Koenig. The Board agent present was Ronald Travis.

A number of matters were discussed about which those present took differing views. For example, the time and place of the proposed election was a matter about which the parties at first disagreed and after discussion came to an understanding. There was also disagreement on the makeup of the unit. The Union had petitioned for a unit covering only one of Respondent's plants. The Cowans took the position that the unit should include both plants and the parties finally agreed to such a unit. There was also a dispute over whether certain employees alleged to be foremen would be allowed to vote and agreement was reached on that.

Board agent Travis advised the Cowans that they would have to supply the names and addresses of employees in the unit in accordance with the requirements of the Board rule in *Excelsior Underwear, Inc.*, 156 NLRB 1236. At that time Respondent had not complied with the *Excelsior* rule, nor has it since. However, Respondent had already supplied a partial list of employees in the unit. Thus by letter of February 12, which was received by the Regional Office on February 13, Respondent provided the names and classifications for 23 employees. During the meeting of February 21 Frederick Cowan orally supplemented the list by adding names which Travis wrote down. This made up all the 28 employees in the unit. William Koenig, the Union representative present, testified that the names were not so orally supplemented at that meeting but in this regard I credit Mildred and Frederick Cowan instead of Koenig.³

³ Ronald Travis did not testify although at the time of the hearing he was no longer a Board agent.

Travis indicated that compliance with the *Excelsior* rule required the Company to supply not only the names but also addresses. Frederick Cown flatly stated that he would not supply the addresses on the ground that this was private, privileged information which the Company as a matter of policy did not give to outsiders. With this refusal to supply the addresses the discussions were stalemated and the Cowans were on the verge of discontinuing further discussions. The stalemate was broken when the Cowans volunteered that their objection did not apply to the addresses of employees who were willing to have their addresses handed over. The Cowans then proposed that they ask the employees for their consent. Both Travis and Koenig acquiesced in this proposal. Apparently Koenig acquiesced because Travis advised him that he could always object to the election if a satisfactory *Excelsior* list was not ultimately supplied. Admittedly he thereafter executed the stipulation for the election but with this reservation which he testified that he verbalized at the meeting. Mrs. Cowan, on the other hand, did not recall that Koenig stated any such reservation. Both she and Frederick Cowan testified that their agreement to the stipulation was conditioned upon their understanding that polling the employees for their consent to hand over addresses was a method agreeable to the Union. Mrs. Cowan testified that they would not have agreed to the stipulation knowing that in any case the election could be set aside if some employees did not agree that their address be handed over. In the circumstances I credit Mrs. Cowan and find that neither Koenig nor Travis stated at the meeting that the election could be set aside if some employees did not consent to the supplying of their addresses. The meeting ended with the parties thinking they had reached an understanding and by their executing the stipulation. In the circumstances I find that Koenig and the Cowans were agreeing to different things. Accordingly, I find there was no meeting of the minds with respect to an essential element of the election stipulation.

2. The Poll

The next day, February 22, Carney directed the employees to individually go into the office where they were polled in the following manner. In the presence of Mr. and Mrs. Cowan and an office clerical employee, each employee was handed a form by Mrs. Cowan who asked him to read it and sign at the appropriate place depending upon the employee's choice. The form read:

In keeping with our Company policy not to divulge employees' personal information to anyone, we ask you to sign this document allowing us permission to give your home address to the National Labor Relations Board, which they will pass on to the Boilermakers Union No. 5

Mildred C. Cowan, Sec/Treas
Frederick C. Cowan, President

Permission granted: _____ Dated _____

Permission not granted: _____ Dated _____

Witness by: _____ Dated _____

The office clerical employee present witnessed each signature as the employee signed. There is no credible evidence that the Cowans made any comment other than that indicated. Of the 28 employees in the agreed upon unit only 11 signed their names after the words "Permission granted."

3. Conclusion Regarding the Polling

The Union contends that polling the employees was objectionable conduct; the General Counsel contends that it was coercive and a violation of Section 8(a)(1) of the Act; Respondent contends that it was neither objectionable nor an unfair labor practice because the Union and the Regional Office agreed to the whole thing.

I think Respondent's position is misplaced because whether or not the Union and the Regional Office agreed to the procedure, the requirements of

an *Excelsior* list are not waivable. See *Formfit Rogers Company*, 163 NLRB 971. Moreover, I find that in the circumstances polling the employees was a coercive interrogation and an unfair labor practice within the meaning of Section 8(a)(1). The foreman during working hours, called each employee to the seat of power where the two principal officers of the Company presented each with a form interrogation. The form of the ballot could reasonably be construed by the employee as requiring him to indicate some preference for or against the Union. His choice in the matter was not secret. It was observed by management which by other conduct had already indicated a preference for no union. And finally, the poll was taken while a petition for a Board election was pending. Polling in this manner was an impermissible interrogation of employees about their union preference. *Struksnes Construction Co., Inc.*, 165 NLRB 1062, 1063. It is immaterial whether or not the Union or the Regional Office of the Board acquiesced in the procedure.

4. Result of the Poll Submitted
to the Regional Office

Although it was on February 22 that 11 of the 28 employees in the unit gave their permission for their addresses to be delivered, it was not until March 7 that Respondent actually delivered that information to the Board's Regional Office. The address of each employee granting permission was written on his form. A xerox copy was then made of the 11 forms and these were submitted to the Regional Office. No explanation appears for the delay in submitting the 11 addresses. No other addresses were submitted then or later.

In addition to the list of names made available at the stipulation meeting on February 21, Respondent again submitted a complete written list of the 28 names on March 12, which was used at the election on March 14 to check eligible voters.

IV. Resolution of Objections to Conduct Affecting Result of Election

1. The Excelsior List

It is clear that Respondent has never complied with the requirements of the *Excelsior* rule. And even though the Regional Director, in advising Respondent by letter of February 23 that the stipulation for certification upon consent election executed by the parties February 21 was approved by him, also advised Respondent that it was required to submit a list of the names and addresses of all eligible voters on or before March 2, Respondent still did not comply. Respondent failed in two specific regards: (1) it was late in submitting the addresses of the 11 employees who agreed to the supplying of that information; and (2) it never submitted a complete list of addresses. Thus it failed to comply substantial'y with the *Excelsior* rule. This failure is ground for setting aside the election and I so recommend. *Rockwell Manufacturing Company*, 201 NLRB No. 57.

In addition, the violations of Section 8(a)(1) found above, occurring between the filing of the petition and the election, constitute grounds for setting aside the election. These include the interrogations of employees about the union activities, direct bargaining with employees about the terms and conditions of employment which involved offers and promises of benefits, and the coercive polling of employees concerning whether they wished their addresses revealed to the Board and the Union.

2. Recommendation

Accordingly, I recommend that the election be set aside. In addition, because there appears to have been no meeting of the minds at the time the stipulation for certification upon consent election was executed on February 21, I recommend that the stipulation be set aside and that the Union's representation petition in Case No. 29-RC-2175 be processed as if no such stipulation had yet been entered into.

V. The Effects of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce. They are unfair labor practices within the meaning of Section 8(a)(1) and 2(6) and (7) of the Act.

Conclusions of Law

1. Respondent is an employer within the meaning of Section 2(2) of the Act and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent has interfered with, restrained and coerced its employees in the exercise of rights guaranteed in Section 7 of the Act and committed unfair labor practices within the meaning of Section 8(a)(1) of the Act by:
 - (a) interrogating employees about their union activities;
 - (b) bargaining directly with its employees regarding terms and conditions of employment and thereby offering and promising them benefits and
 - (c) coercively polling its employees as to whether they wished their addresses revealed to the Board and to the Union.
4. Such unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent engaged in unfair labor practices I recommend that it cease and desist therefrom, and take affirmative action to effectuate the policies of the Act, including the posting of appropriate notices. The General Counsel takes the position that the evidence is insufficient to establish

a union demand for recognition or union majority status, and, therefore, a bargaining order would not be appropriate here. I agree.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:⁴

ORDER

Respondent, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

- (a) Coercively interrogating employees about their union activities.
- (b) Bargaining directly with employees in a manner violative of Section 8(a)(1) of the Act.
- (c) Promising employees benefits or offering them improvements in terms and conditions of employment to induce them not to support, or to vote against, a union.
- (d) Polling employees in a coercive manner about whether they approve or disapprove the supplying of their addresses to the Board and a union.
- (e) In any like or related manner interfering with, restraining or coercing employees in the exercise of the right of self-organization, to form labor organizations, to join or assist Local Lodge No. 5, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities, except to the extent

⁴ In the event that no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a) (3) of the Act as modified by the Labor-Management Reporting and Disclosure Act of 1959.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Post at both its plants in Plainview, New York, copies of the attached notice marked "Appendix."⁵ Copies of said notice on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the Regional Director for Region 29, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the allegations of the complaint not hereinabove found to be supported by the evidence be, and they hereby are, dismissed.

IT IS FURTHER RECOMMENDED (a) that the election held in Case No. 29-RC-2175 be set aside; (b) that the stipulation for certification upon consent

⁵ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

election entered into by the parties in that matter be set aside and (c) that the pending representation petition in that matter be processed in accordance with standard procedures of the Board.

Dated at Washington, D.C.

/s/ James M. Fitzpatrick
James M. Fitzpatrick
Administrative Law Judge

[APPENDIX TO EXHIBIT B]

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

AFTER A TRIAL AT WHICH ALL SIDES HAD A CHANCE TO GIVE EVIDENCE THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT WE VIOLATED THE NATIONAL LABOR RELATIONS ACT AND HAS ORDERED US TO POST THIS NOTICE.

The Act give all employees these rights:

- To engage in self-organization;
- To join, form or help unions;
- To bargain collectively through representative of their own choosing;
- To act together for collective bargaining or other mutual aid or protection; and
- To refrain from any or all these things.

WE WILL NOT do anything that interferes with, restrains or coerces our employees with respect to these rights.

WE WILL NOT coercively interrogate our employees about their union activities.

WE WILL NOT unlawfully bargain directly with our employees.

WE WILL NOT offer or promise our employees benefits to induce them to abandon or vote against a union.

WE WILL NOT coercively poll our employees as to whether they approve or disapprove our supplying their addresses to the National Labor Relations Board and to the Union.

FREDERICK COWAN & COMPANY, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, 4th Floor, Brooklyn, New York 11241 (Tel. No. 212-596-3535).

EXHIBIT C

[Dated January 18, 1974]

* * * * *

ORDER

On October 31, 1973, Administrative Law Judge James M. Fitzpatrick of the National Labor Relations Board issued his Decision in the above-entitled proceeding and, on the same date, the proceeding was transferred to and continued before the Board in Washington, D.C. The Administrative Law Judge found that the Respondent has engaged in certain unfair labor practices, and recommended that it take specific action to remedy such unfair labor practices. He further recommended that the election held in Case 29-RC-2175 be set aside; that the stipulation for certification upon consent election entered into by the parties be set aside; and that the pending representation petition be processed in accordance with standard procedures of the Board.

No statement of exceptions having been filed with the Board, and the time allowed for such filing having expired,¹

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, and Section 102.48 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Board hereby adopts the findings and conclusions of the Administrative Law Judge as contained in his Decision, and orders that the Respondent, Frederick Cowan & Company, Inc., its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order of the Administrative Law Judge.

IT IS FURTHER ORDERED that the election conducted in Case 29-RC-2175 on March 14, 1973, be, and it hereby is, set aside.

¹ At the request of the Respondent, the time for filing exceptions and brief was extended to December 14, 1973.

IT IS FURTHER ORDERED that the stipulation for certification upon consent election entered into by the parties on February 23, 1973, be, and it hereby is, set aside.

IT IS FURTHER ORDERED that the above-entitled proceeding be, and it hereby is, remanded to the Regional Director for Region 29 for further appropriate action.

Dated, Washington, D.C., January 18, 1974.

By direction of the Board:

George A. Leet

Associate Executive Secretary

BOARD EXHIBIT NO. 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

FREDERICK COWAN & COMPANY, INC.,
Employer¹
and

29-RC-2175

LOCAL LODGE NO. 5, INTERNATIONAL
BROTHERHOOD OF BOILERMAKERS,
IRON SHIP BUILDERS, BLACKSMITHS,
FORGERS AND HELPERS, AFL-CIO,
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.²

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purpose of the Act to assert jurisdiction herein.
2. The labor organization involved claim(s) to represent certain employees of the Employer.

¹ The name of the Employer appears as amended at the hearing.

² Although duly served with notice of the hearing, the Employer did not appear or participate. However, through its attorney, it notified the hearing officer that it conceded jurisdiction, the labor organization status of the Petitioner, and the appropriateness of the petitioned-for unit. This was later confirmed by letter.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c) (1) and Section 2(6) and (7) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance, shipping and receiving employees and drivers employed by the Employer at its 120 Terminal Drive and 101 Commercial Street, Plainview, New York, locations, excluding office clerical employees, draftsmen, engineers, salesmen, casual part-time employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, or on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election

date and who have been permanently replaced.³ Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by Local Lodge No. 5, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO.⁴

Dated April 10, 1974
at Brooklyn, New York

/s/ SAMUEL M. KAYNARD

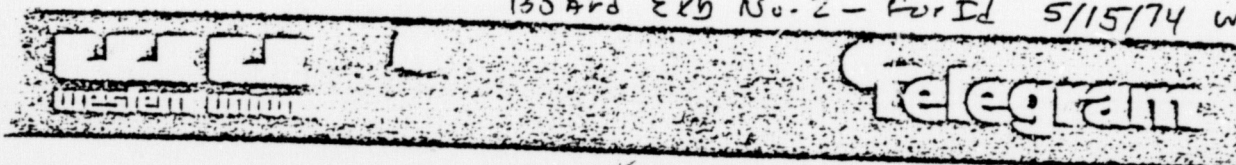
Samuel M. Kaynard
Regional Director, Region 29

³ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Direction of Election. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such a list must be received in the Regional Office, 16 Court Street, Brooklyn, New York, on or before April 17, 1974. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

⁴ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board in Washington, D.C. The request must be received by the Board in Washington by April 22, 1974.

EXHIBIT E

Board Exb No. 2 - For ID 5/15/74 wa.

received in EUC
5/15/74

BJC142(1052)(2-010112E103)PD 04/13/74 1352
ICS IPMMIZZ CSP
5167425100 IDMT MINEOLA NY 21 04-18 1052A EDT
PMS NATIONAL LABOR RELATIONS BOARD, DLR
ATTN RICHARD EPISANIO 15 COURT ST
BROOKLYN NY 11241
RE FREDERICK COWAN AND CO INC CASE NUMBER 29-RC-2175 RESPECTFULLY
REQUEST EXTENSION OF TIME REGARDING EXCELSIOR REQUIREMENT LETTER
WILL FOLLOW
BARATTA AND SOLLEDER
NNNN

Exb E

EXHIBIT F

Board Exb-3, for ID 5/15/74



NATIONAL LABOR RELATIONS BOARD

REGION 29

16 Court Street

Brooklyn, New York 11241

Telephone (212) 596-3533

May 3, 1974

Erino Baratta, Esq.
210 Old Country Road
Mineola, New York 11501

Re: Frederick Cowan & Company, Inc.
Case No. 29-RC-2175

Dear Sir:

On April 10, 1974, a Decision and Direction of Election was issued in the above-captioned case, which directed, inter alia, that the Employer file with the undersigned, within seven (7) days of the date of the Decision and Direction of Election, an election eligibility list, containing the names and addresses of all the eligible voters; and that, inter alia, in order to be timely filed, the list was to be received at the Regional Office on or before April 17, 1974; and that no extension of time to file the list could be granted except in extraordinary circumstances.

I understand that on April 17, 1974, you telephoned the Regional Office and spoke to Richard Epifanio, a member of my staff, requesting an extension of time to file the list of names and addresses of eligible voters and that Mr. Epifanio advised you at that time to submit your request directly to me forthwith, in writing, together with your reasons therefor.

Thereafter, by telegram dated April 18, 1974 to the Regional Office, which was received on the same date, you requested an extension of time regarding the "Excellor requirement," and advised therein that a letter would follow, presumably setting forth the reasons for your request. To date, we have failed to receive any such letter from you.

Under all the circumstances, I hereby deny your request for an extension of time to file the list of names and addresses of eligible voters in this matter, particularly since your formal request was not transmitted until after the time for filing such list had expired.

Very truly yours,

cc: Local Lodge No. 5
Frederick Cowan & Company

Samuel M. Keynard
Regional Director

RECEIVED ALL
MAY 15 1974

Exb F

Received in Evid. 5/15/74

EXHIBIT G

NLRB-1
(7-4)

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To Frederick C. Cowan, President
Frederick Cowan & Company, Inc.
120 Terminal Drive, Plainview, New York

Request therefor having been duly made by Samuel M. Kaynard, Regional Director
National Labor Relations Board, Region 29
whose address is 15 Court Street, Brooklyn, New York 11241

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE a Representative
of the Regional Director, Region 29 of the National Labor Relations Board,
at 15 Court Street, 4th floor
in the City of Brooklyn, New York
on the 15th day of May
of that day, to testify in the Matter of
Frederick Cowan & Company, Inc.
Case No. 29-RC-2175

And you are hereby required to bring with you and produce at said time and place the
following books, records, correspondence, and documents:

The books and records of Frederick Cowan & Company, Inc., containing the
names and addresses of all employees employed during the payroll period ending
April 6, 1974, or during such later payroll eligibility period as the Regional
Director or his designated representative may subsequently specify, in the
following collective bargaining unit:

All production and maintenance, shipping and receiving
employees and drivers employed by Frederick Cowan & Company,
Inc. at its 120 Terminal Drive and 101 Commercial Street,
Plainview, New York locations, excluding office clerical
employees, draftsmen, engineers, salesmen, casual part-time
employees, guards and supervisors as defined in the Act.

A list of the employee names and addresses described above, signed by an authorized
agent of the employer will be accepted in lieu of the subpoenaed books and records;
provided that designated agents of the National Labor Relations Board are permitted,
upon request, to verify the contents of the list by examination of the subpoenaed
books and records at a time and place convenient to the employer, but not later
than the date of appearance specified in the subpoena, or such later date as the
Regional Director or his designated representative may subsequently specify.

B- 108165

In testimony whereof, the seal of the National Labor
Relations Board is affixed hereto, and the undersigned, a
member of said National Labor Relations Board, has hereunto
set his hand and authorized the issuance hereof.



Issued at Brooklyn, New York
this 6th day of May, 1974.

E. B. Sellen

NOTICE TO WITNESS.—Witness fees for attendance, transportation, and mileage, under this subpoena are payable by the party at whom
served the witness is summoned. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall
submit this subpoena with the voucher when claiming reimbursement.

NLRB-407-4

Exb B

EXHIBIT I

BEFORE THE
NATIONAL LABOR RELATIONS BOARD
29th REGION

In the Matter of:

FREDERICK COWAN & COMPANY, INC.

:
:
: **Case No. 29-RC-2175**
:

16 Court Street
Brooklyn, New York
May 15, 1974

The above entitled matter came on for hearing, pursuant to subpoena, at
11:30 o'clock A.M.

BEFORE:

ARTHUR GOLDBERG, Hearing Officer

APPEARANCES:

MAX SCHWARTZ, ESQ.

16 Court Street, Brooklyn, New
York, appearing on behalf of the
General Counsel

I N D E X

(No witnesses were called at this time.)

E X H I B I T S

BOARD EXHIBITS:FOR IDENTIFICATIONIN EVIDENCE

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P R O C E E D I N G S

HEARING OFFICER: This is a hearing in connection with the issuance of a subpoena duces tecum in the matter of Frederick Cowan and Company, Inc., case number 29-RC-2175.

The Hearing Officer in this matter is Arthur Goldberg, a Board Agent of the National Labor Relations Board, Region 29, 16 Court Street, Brooklyn, New York.

For the record, will counsel for the Board note his appearance?

MR. SCHWARTZ: Max Schwartz, assistant Regional Attorney, Region 29.

HEARING OFFICER: Let the record indicate that there is no appearance on behalf of Frederick Cowan and Company, Inc. nor for that matter is there any appearance for any other party other than the counsel for the Board.

Mr. Schwartz?

MR. SCHWARTZ: Mr. Hearing Officer, could I ask the Reporter to mark the Decision and Direction of Election in case number 29-RC-2175, Frederick Cowan and Company.

I submit for identification a copy of the original decision signed by Regional Director Samuel M. Kaynard, dated April 10, 1974.

HEARING OFFICER: It will be so marked.

(Whereupon, above referred to document was received and marked Board Exhibit 1 for identification, of this date.)

4 MR. SCHWARTZ: Mr. Hearing Officer, I would ask you to note that the Decision and Direction of Election in footnote two —

HEARING OFFICER: Three.

MR. SCHWARTZ: Footnote three calls for the filing of an election eligibility list otherwise referred to as an excelsior list and that said list, and I

quote, must be filed by the employer with the Regional Director within 7 days of the date of this Decision and Direction of Election.

The direction of election marked Board Exhibit 1 for identification is dated April 10, 1974.

Let the record show that no such list has been received to date.

I move, Mr. Hearing Officer, that the record so show.

HEARING OFFICER: Well, it is in the record.

MR. SCHWARTZ: The record should show that no excelsior list has been submitted to date.

I now move that the Board Exhibit 1 for identification be introduced into evidence.

HEARING OFFICER: It will be so received and marked for evidence, Board Exhibit 1.

(Whereupon, Board Exhibit 1 for identification, was received into evidence, of this date.)

5 MR. SCHWARTZ: Mr. Hearing Officer, I now ask that a telegram dated April 18, 1974, received April 18, 1974 at 1:54 P.M. be marked for identification as Board Exhibit 2.

HEARING OFFICER: It will be so marked.

(Whereupon, above referred to document was received and marked Board Exhibit 2 for identification, of this date.)

MR. SCHWARTZ: Board Exhibit 2 for identification is a request from Counsel Baratta, for the Company, Frederick Cowan, requesting an extension of time in regard to the submission of the excelsior list.

It should be noted that this telegram requests an extension of time for the filing of the excelsior list.

I now offer in evidence Board Exhibit 2.

HEARING OFFICER: It will be so received and marked.

(Whereupon, Board Exhibit 1 for identification, was received into evidence, of this date.)

MR. SCHWARTZ: I now ask the Hearing Officer to mark for identification Board Exhibit 3 a letter addressed to counsel Baratta, for Frederick Cowan, dated May 3, 1974.

Said letter notes that no letter was received from counsel in connection with the telegram received in evidence as Board Exhibit 2 and the Regional Director, in Board Exhibit 3 for identification, denied the request for extension of time to file an excelsior list.

6 Would you mark this please as Board Exhibit 3 for identification?

HEARING OFFICER: It will be so marked.

(Whereupon, above referred to document was received and marked Board Exhibit 3 for identification, of this date.)

MR. SCHWARTZ: I now offer in evidence, Board Exhibit 3.

HEARING OFFICER: It will be so received and marked.

(Whereupon, Board Exhibit 3 for identification, was received into evidence, of this date.)

MR. SCHWARTZ: It should be noted but attached to Board Exhibit 3 is a postal receipt, registry number 222625, and carrying a signature indicating that said receipt was accepted by the agent of Bruno Baratta.

I would ask the hearing officer to have marked as Board Exhibit 4 a subpoena duces tecum dated May 6, 1974 addressed to Frederick C. Cowan, president, Frederick Cowan and Company, with a postal receipt attached thereto, postal receipt number 222643, and that said postal receipt has a date stamped May 7, 1974 and has on it what appears to be the signature of an agent of Frederick Cowan.

I ask that it be marked as Board Exhibit 4.

HEARING OFFICER: It will be so marked.

7

(Whereupon, the above referred to document was received and marked Board Exhibit 4 for identification, of this date.)

MR. SCHWARTZ: Now, Board Exhibit 4, the subpoena carrying number B-108165, directs Frederick Cowan to produce the books and records of said company containing the names and addresses of all employees for the payroll period ending April 6, 1974 and it calls for said appearance on May 15, 1974 at 11:00 o'clock at the offices of Region 29, 16 Court Street, Brooklyn, Fourth floor.

I ask that the Hearing Officer receive in evidence Board Exhibit 4 for identification.

HEARING OFFICER: It will be so received and marked.

(Whereupon, Board Exhibit 7 for identification, was received into evidence, of this date.)

MR. SCHWARTZ: I now call upon Frederick C. Cowan to come forward and present the materials, books and records, names and addresses of all employees employed during the payroll period ending April 6, 1974 for the specific collective bargaining unit to wit all production and maintenance, shipping and receiving employees and drivers employed by Frederick Cowan and Company, Inc. at its 120 Terminal Drive and 101 Commercial Street, Plainview, New York locations, office clerical employees, draftsmen, engineers, salesmen, casual part-time employees, guards and supervisors to be excluded as defined

8 in the Act.

I would have the Hearing Officer note that there has been no response to my request in this hearing room.

HEARING OFFICER: The record will so indicate.

Let the record reveal that there has been no appearance at this hearing by any representative of Frederick Cowan and Company, Inc.

Let the record further reveal that during the course of this hearing the Hearing Officer received a telephone call from Mr. Bruno Baratta, counsel for Frederick Cowan and Company, Inc. who indicated that his client, Frederick Cowan and Company, Inc. would not be represented at the hearing or make an appearance at the hearing.

Baratta requested that his position in this regard be noted on the record that the company, Frederick Cowan and Company, Inc., has refused to present the subpoenaed list of employees involved in this case because the company has in its possession statements from employees in which they indicate that they do not want their employer to reveal to the National Labor Relations Board their respective addresses.

I advised Mr. Baratta per his request I would make that statement on this record in his behalf.

MR. SCHWARTZ: Mr. Hearing Officer, the Board at this point, in view of the failure on the part of counsel for the company to comply with the subpoena and in view of his failure to appear and to submit the requested
9 material and information requested that this hearing now be closed and that the company be informed that it is the intention of the Board to seek Court enforcement of the subpoena marked as Board Exhibit 4.

The counsel for Board at this point has no further matters that it wishes to go into.

HEARING OFFICER: The hearing is postponed indefinitely at this time to permit the Board to take what steps are necessary to obtain the documents and records subpoenaed as set forth in Board Exhibit 4.

The hearing stands adjourned.

(Whereupon, the hearing was adjourned at 12:00 P.M.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NATIONAL LABOR RELATIONS BOARD,

Applicant,

- against -

FREDERICK COWAN & COMPANY, INC.,

Respondent.

:
:
:
: 74C 791 Opinion
: July 17, 1974
:
:

PLATT, J.

This proceeding had its origins on February 6, 1973 when Local Lodge #5, International Brotherhood of Boiler Makers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO (hereinafter called the "Union") filed a petition with the Applicant (hereinafter sometimes the "Board") herein (Case No. 29-RC-2175) requesting an election among employees of Respondent.

As a result of the filing of such petition, the Respondent, the Union and a Board Agent, met on February 21, 1973 for the purpose of negotiating a stipulation for certification upon consent election. Those present for the Respondent included Mr. and Mrs. Cowan and their attorney, Bruno Baratta; Mr. William Koenig for the Union and Mr. Ronald Travis for the Board, its Agent.

A number of matters were in dispute, negotiations ensued and a settlement on various issues was made. Among the issues in dispute was the Board's stated requirement that the Cowans would have to supply the names and addresses of employees in the unit in accordance with the requirements of the Board in its *Excelsior Underwear, Inc.*, 156 NLRB 1236 case.

According to the decision of the Administrative Law Judge of the Board, the stalemate on this issue was broken when the Cowans volunteered that their objection did not apply to the addresses of employees who were willing to

have their addresses handed over and the Cowans proposed that they ask the employees for their consent. Both the Union and the Board agreed to this proposal and a settlement of all the issues was achieved.

In the past, courts have consistently upheld settlements and stipulations freely arrived at between the parties in labor disputes as contracts between such parties and, unless otherwise contrary to law, binding upon the parties thereto according to its terms. *N.L.R.B. v. United Dairies, Inc.*, 337 F.2d 283, 286 (10th Cir. - 1964), stipulation and agreement to waive representation hearing and composition of appropriate bargaining unit; *N.L.R.B. v. Carlton Wood Products*, 201 F.2d 863, 36 ALR2d 1070 (9th Cir. - 1953), agreement to waive representation hearing; *N.L.R.B. v. Standard Transformer Co.*, 202 F.2d 846 (6th Cir. - 1953), agreement to waive representation hearing.

Thus, on February 21, 1973, the Union and Respondent executed a stipulation for certification upon consent election which was approved on February 23 by the Regional Director for the Board's Region 29.

On February 22, 1973, each employee was handed a form by Mrs. Cowan containing the following language and request for permission:

"In keeping with our Company policy not to divulge employees personal information to anyone, we ask you to sign this document allowing us permission to give your home address to the National Labor Relations Board, which they will pass on to the Boiler Makers Union #5.

Mildred C. Cowan,
Secretary

Frederick C. Cowan,
President

Permission granted: _____ Dated _____
 Permission not granted: _____ Dated _____
 Witnessed by: _____ Dated _____

The office clerical employee present at the time witnessed each signature as the employee signed. The Administrative Law Judge specifically found that "There is no credible evidence that the Cowans made any comment other than that indicated. Of the 28 employees in the agreed upon unit, only 11 signed their names after the words 'Permission granted'".

Copies of the 11 forms containing the addresses of each employee granting permission were submitted to the Regional Office and Respondent submitted a complete written list of the 28 names of all its employees.

The election was held on March 14, 1973 and 25 ballots were cast of which 11 were for the union, 12 against and 2 were challenged.

The Regional Director investigated the challenged ballots and in his report he recommended to the Board that the challenges to the 2 ballots be sustained.

As this Court reads the record, the election held pursuant to the agreement made between the Board's duly authorized agent, the duly authorized representative of the Union and the duly authorized representatives of the Company resulted in 12 votes against the Union and 11 votes for.

In recommending that the election be set aside on various grounds, the Administrative Law Judge said that "in addition, because there appears to have been no meeting of the minds at the time the stipulation for certification upon consent election was executed on February 21, I recommend that the stipulation be set aside and that the Union's representation petition in Case No. 29-RC-2175 be processed as if no stipulation had yet been entered into."

The Court finds absolutely no justification whatsoever for this recommendation.

In the course of his opinion, the Administrative Law Judge made such extraordinary statements as "the form of the ballot could reasonably be construed by the employee as requiring him to indicate some preference for or against the Union."

Any reasonable reading of the form can only lead one to conclude just the opposite. It appears without any doubt to this Court that the management (in a fashion designed to be in favor of the Union) asked each employee for permission to give his home address to the National Labor Relations Board. This would clearly seem to suggest to the employee that the management wished an affirmative rather than a negative answer thereto (*i.e.*, one in favor of the Union rather than against it).

The Administrative Law Judge went on to say that such polling under such circumstances "was a coercive interrogation and an unfair labor practice." Under the circumstances, the Court finds such conclusion to be arbitrary and unreasonable.

Accordingly, and in other words, the Court finds no reasonable or substantial basis upon which to set aside the stipulation made between management's, the Board's and the Union's representatives.

The Board's argument and case cited herein (*Formfit Rogers Co. v. N.L.R.B.*, 71 LRRM 16,636 (D.C.M.D., Tenn., 1969)) that its *Excelsior* rule requirements cannot be "waived" misses the point. The question is not one of request, denial and election without the list, *i.e.*, waiver, but rather one of a settlement and compromise of issues arrived at freely between the parties and an attempt by two of the parties to the settlement to repudiate the same when the results thereof did not turn out to their satisfaction.

Based upon the decision of the Administrative Law Judge issued on October 31, 1973, which also found other unfair labor practices, the aforescribed election was set aside by order of the Board dated January 18, 1974 and the proceeding was remanded by the Board to the Board's Regional Director for Region 29.

On April 10, 1974 the Board's Regional Director for Region 29 issued a decision and direction of election in the proceeding pursuant to Section 9(c)-(1) of the Act (29 U.S.C. §159(c)(1)) in which he directed an election to be held in the unit of approximately 25 production, maintenance, shipping and

receiving employees and drivers at Respondent's two plants in Plainview, New York.

In such decision and direction, however, the Regional Director further directed Respondent to furnish an election eligibility list containing the names and addresses of all of the employees eligible to vote to the Regional Director on or before April 17, 1974, in direct contravention of the stipulation made between the parties and executed on February 21, 1973.

When the Respondent refused to comply with such decision and direction, the Regional Director caused a subpoena duces tecum to be issued on May 6, 1974 pursuant to Section 11(1) of the Act (29 U.S.C. §161(1)) directing Respondent to produce and make available to the Board's Regional Office Respondent's books and records, or an eligibility list in lieu thereof setting forth the names and addresses of all employees eligible to vote in the election.

Following Respondent's failure to comply with such subpoena the Board applied to this Court pursuant to Section 11(2) of the National Labor Relations Act for an order requiring Respondent to comply therewith.

In addition to what has been said above, the Court need only remind the litigants that the "law actively encourages compromise and settlement of disputes." *Stanspec Corp. v. Jelco, Inc.*, 464 F.2d 1184 (10th Cir. - 1972); *Florida Trailer & Equipment Corp. v. Deal*, 284 F.2d 567 (5th Cir. - 1960); *W.J. Perryman & Co. v. Penn Mut. Fire Ins. Co.*, 324 F.2d 791 (5th Cir. - 1963); *Moses-Ecco Co. v. Roscoe-Ajax Corp.*, 320 F.2d 685, 115 U.S. App. D.C. 366 (C.A.D.C., 1963).

This case is no exception. This Court is not favorably disposed to the Board's application to have this Court ratify and condone their attempt to breach a settlement and stipulation freely arrived at between the parties herein on the premises indicated in the opinion of the Board's own Administrative Law Judge.

Accordingly, the Board's motion is granted only to the extent that Respondent is directed to produce the names of all (and addresses of consenting) employees eligible to vote in the new election directed by the Board but otherwise is denied in all respects.

SO ORDERED.

The foregoing makes it unnecessary for this Court to determine the perhaps more significant question posed by the Board's application (which it claims to be established law in its favor), namely, whether an employee's right to privacy clearly asserted by the employees herein may be invaded by an arm of the government arguing in effect that it is entitled to do so because it knows best what is good for an employee. Such question, which causes this Court grave concern in this age of the protection of the rights of the individual, need not now be resolved.

The Clerk of the Court is directed to mail copies of this opinion to counsel for the parties herein.

/s/ THOMAS C. PLATT
Thomas C. Platt, U.S.D.J.

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Appellant,

v.

FREDERICK COWAN & COMPANY, INC.,

Appellee.

No. 74-2234

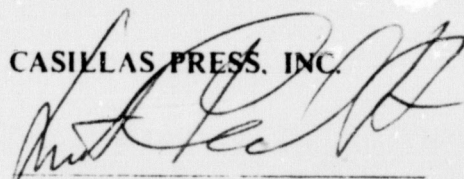
CERTIFICATE OF SERVICE

I hereby certify that I have served by hand (by mail) two copies of the
• APPENDIX in the ~~above-entitled~~ case, on
the following counsel of record, this 24 day of Feb. 1975

Messrs. Baratta & Solleder
Attn: Bruno Baratta, Esq.,
210 Old Country Rd.
Mineola, N. York 11501

Elliott Moore, Esq.,
Deputy Associate General Counsel
National Labor Relations Board
Washington, D.C. 20570

CASILLAS PRESS, INC.


1717 K Street, N. W.
Washington, D. C. 20036
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Subscribed and Sworn to before me this